

DOI: 10.46340/eppd.2020.7.3.30

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THE LEGAL ISSUES OF SURROGACY IN UKRAINE

The article explores the legal principles of surrogacy in Ukraine. The positions of scientists on taking into account the interests of a child born as a result of the use of surrogacy are analyzed. It has been established that surrogacy should be contractual. The practical problems that arise during the making contracts and the use of such assisted reproductive technology as surrogacy are investigated. The solutions to the mentioned problems are suggested. The general legal principles of surrogacy and both variational and national peculiarities are distinguished. In Ukraine, surrogacy is only performed if there are medical grounds for the procedure and the possibility of use in the interests of the married man and woman.

Keywords: surrogacy, reproductive medicine, assisted reproductive technologies, surrogate mother, contract.

Relevance of the research. The state of regulation of the reproductive health of the population in Ukraine has many problems. These include insufficient information about healthcare facilities, the number of operations for artificial termination of pregnancy, the high likelihood of complications in the onset of unwanted pregnancy, artificial interruption, and insufficient amount of necessary equipment. The state itself must directly ensure safe motherhood, guarantee the empowerment of the rights of the citizens with regard to controlling their reproductive life, provide access to information and family planning services.

Up to date, surrogacy is one of the effective ways of overcoming the problem of infertility and procreation. Although the society's attitude toward this method of reproductive medicine is contradictory, and often borders on one hundred percent approval and categorical objection, its benefit and necessity is obvious. Reproductive technology still has enough legal issues that need to be regulated. The realities of time require further reformation of the field of reproductive medicine, which should be reflected in its regulatory framework in order to create a perfect legal framework, protection against unlawful encroachments on biological human rights.

Analysis of recent research and publications. Today, the interest of scientists in the process, features, measurements and problems of reproduction in general, and in particular, the right to surrogacy, has increased significantly. Most problems are addressed in civil law, in particular through the analysis of contractual relations of surrogacy. In scientific literature, the problems of legal regulation of surrogacy were investigated by T. Ye. Borisova, S. B. Buletsa, V. A. Vatrás, N. M. Kvit, L. Krasyt'ska, A. S. Kolomiets, R. A. Maidanyk, Kh. S. Mirsayev, O. V. Onishchenko, Yu. Yu. Talanov, N. Fedorchenko, O. A. Yavor and other scientists. Despite the existence of scientifically grounded proposals to improve the legal regulation of surrogacy, the Ukrainian legislation in this area is imperfect.

The purpose of the research is to analyze the current state of legal regulation of surrogacy in Ukraine, to identify the existing problems and to outline possible ways of solving them.

Presenting main material. In Ukraine, surrogacy has a history of more than 30 years¹. However, most Ukrainian families suffering from infertility, and these are 10-15%, cannot try the surrogacy program because of its high cost. Instead, such a program is attractive to foreign citizens because of imperfect Ukrainian legislation governing surrogacy and the available cost of the program to foreign citizens. These factors made Ukraine one of the most attractive countries for "reproductive tourism" today, despite the fact that legal support for surrogacy is one of the most legally unsettled and complex issues in the area of family law in Ukraine and in current legal practice.

¹ Аблятіпова, Н.А. (2009). Проблеми сурогатного материнства в Україні. *Актуальні проблеми держави і права*, 51, 167-172.

Surrogacy, which has become a major find in society in overcoming infertility, is now commonplace. However, surrogacy has many contradictions. There is legislation that protects the interests of both parents and surrogate mothers. The jurisprudence of surrogacy has many different matters concerning the upbringing and support of a born child. Often there are situations when the parents give up for adoption of the child at birth, and the surrogate mother has to apply to the court for violation of previously concluded and signed contract. At the same time, there are often situations where surrogate mothers refuse to give the born child to the family, which can also lead to lawsuits, etc.

The result of providing surrogacy is the birth of the child, not the child itself¹. Undoubtedly, this position refutes the arguments of surrogacy opponents that “a child cannot be an item of goods” and affirms its recognition as a subject of relations.

The principle of respect for the “best interests of the child” in making decisions concerning the child is first and foremost enshrined in the Convention on the Rights of the Child (hereinafter – the Convention), which, by virtue of the provisions of Art. 9 of the Constitution of Ukraine is part of the national legislation, and part 1 of Art. 2 of the Law of Ukraine on the Protection of Childhood stipulates that the legislation on the protection of childhood is based, in particular, on the Convention. In accordance with Article 3, paragraphs 1, 2 of the Convention in all actions concerning children, whether they are carried out by public or private institutions, which provide social services, courts, administrative or legislative bodies, the priority is given to the best insurance of the interests of the child.

The legislation of Ukraine does not regulate in detail the procedure of surrogacy. In the Family Code only in Art. 123 rules for determining the origin of a child born as a result of the use of assisted reproductive technologies are established. One of the mandatory conditions for the use of surrogacy is to have a genetic link between the fetus and at least one of the parents, evidenced by the relevant certificate of a medical institution providing a service of assisted reproductive technologies. However, this mechanism for confirming compliance with the condition of genetic affinity is not a 100% guarantee of preventing births of children in surrogate programs without genetic connection with the parents participating in such a program. Abuse of medical institutions and customers may be the cause of such violations.

At present in Ukraine the legislative framework for regulating the relations of the use of assisted reproductive technologies (including surrogacy) is made up of the following norms: the Civil Code of Ukraine, the Family Code of Ukraine, the Law of Ukraine “The Basic Law on the Health Protection of the Citizens of Ukraine”, the Procedure for the use of assisted reproductive technologies in Ukraine, approved by the order of the Ministry of Health of Ukraine of 09.09.2013 № 787, Rules of state registration of acts of civil status in Ukraine, approved by the order of the Ministry of Justice of Ukraine and of 18.10.2000 № 52/5.

In Ukraine, the surrogacy method is governed by the Order of the Ministry of Health of Ukraine “On Approval of the Procedure for the Use of Assistive Reproductive Technologies in Ukraine” No. 787 of September 9, 2013. According to it, the necessary conditions for the surrogacy are:

- the presence of medical evidence (absence of the uterus (congenital or acquired); deformation of the cavity or cervix in congenital malformations or as a result of surgical interventions, benign tumors, when it is impossible to bear a child; structural or anatomical changes of the endometrium, which lead to the loss of receptivity; non-treatable uterine cavities; severe somatic illnesses during which pregnancy threatens the recipient’s future health or life but which do not affect the health of the unborn child; further retry of the ART (4 times or more) upon repeated receipt of high-quality embryos, the transfer of which did not lead to the onset of pregnancy);
- the required list of documents (statement of surrogate mother; copy of passport of surrogate mother; copy of certificate of marriage or divorce of surrogate mother (except single women); copy of birth certificate of child (children); consent of husband of surrogate mother for her participation in surrogacy program; statement of patient / patients on the use of ART; copies of passports; copy of marriage certificate; notarized copy of written joint agreement between surrogate mother and woman (husband) or a married couple);
- the married couple (or one of the expectant parents) must have a genetic connection with the child;
- the surrogate mother should not have a direct genetic connection with the child. Close relatives of expectant parents (mother, sister, cousin, etc.) may carry the pregnancy².

¹ Федорченко, Н. (2016). Особливості укладення договору про сурогатне материнство. *Підприємництво, господарство і право*, 12, 65-68.

² *Наказ про затвердження Порядку застосування допоміжних репродуктивних технологій в Україні 2013* (Міністерство охорони здоров’я України). *Офіційний сайт Верховної Ради України*. <<https://zakon.rada.gov.ua/laws/show/z1697-13>> (2020, March, 20).

There is no single profile law in Ukraine that would fully regulate the relationship of surrogacy with guarantees for the protection of the rights of children born as a result of the use of assisted reproductive technologies. However, certain legislation provisions regulate certain issues of protection of the rights of children born through surrogacy.

In Ukraine, the presumption of paternity of biological parents who are the customers of the surrogacy program is codified. Problems with establishing the origin of children arise when foreigners from the countries, where surrogacy is forbidden, are the beneficiaries of surrogate programs, or the recognition of paternity in such cases is only possible through the adoption procedure. There are cases when foreign governments do not recognize the state registration of births of children, conducted by the authorities of the state registration of civil status acts of Ukraine, and require paternity confirmation in court (in accordance with the applicable procedural law cases of establishing the facts of legal relations are considered in a separate procedure).

However, in the scientific community it is recommended to pay attention to the fact that in the case of an unmarried woman participating in the surrogacy program, after the birth of the child, there may be issues with the registration of the child in the authorities of the state registration of acts of civil status. This is due to a possible denial of registration. The state registration authorities explain this decision by the fact that the law does not provide the procedure for the registration of a child born by a surrogate mother for an unmarried woman, and the surrogacy program is conducted only for a married couple¹. After all, in Art. 123 of the Criminal Code of Ukraine and in the Decree of the Ministry of Justice of Ukraine of October 18, 2000 No. 52/5 only married couples are mentioned. We believe that such a refusal to register a child is unlawful and restricts the rights of an unmarried woman. In addition, the refusal of registration violates the child's right to know its parents and the right to their care, which is enshrined in Art. 7 of the UN Convention on the Rights of the Child².

N. S. Baiboroshka believes that in case when the aim of single men and women is their desire to have a child "born" genetically, and for objective reasons (a diagnosis of infertility) it is not possible, such persons should be given the right to take part in a surrogacy program, which should be based primarily on the genetic connection of the child with its parents³.

Having considered above the question of the possibility of participation of an unmarried man and an unmarried woman in the ART, it is advisable to refer to the opinion of A. P. Holovashchuk, who proposes to recognize these persons as subjects of relations with the ART and to consolidate this provision in the legislation of Ukraine by amending Art. 123 of the Family Code of Ukraine: "In the case of the birth of a child by a surrogate mother for a woman (potential mother) who is not married, the record of the father of the child in the Birth Registration Book should be kept by the surname and nationality of the woman (potential mother), and the name and on the patronymic of the child is recorded at her instruction. In the case of the birth of a surrogate mother for a man (potential father), who is not married, the child's record in the Birth Registration Book is recorded by surname, patronymic and nationality of the man (potential father), and the child's name is recorded at his instruction"⁴.

The importance of improving the legal regulation of the field of assisted reproductive technology services is due to the frequent cases of violations of the rights of persons who have used such services, including the violations by medical institutions. One of the reasons for the unprotectedness of the rights of the recipients of such services is the broad contractual regulation of relations in the field of fertility science under the conditions of the absence of legal guarantees to ensure their protection.

In case of the absence of legislative regulation, there are many practical issues that can result in litigation, in particular when a surrogate mother changes her mind about giving a child to potential

¹ Головащук, А.П. (2012) Допоміжні репродуктивні технології як спосіб реалізації права на материнство. *Верховенство права, законність та права людини: матеріали Міжнародної науково-практичної конференції* (2012, м. Київ). Київ, 31-32.

² Конвенція ООН про права дитини 1989 (Генеральна Асамблея ООН). *Офіційний сайт Верховної Ради України*. <<http://zakon4.rada.gov.ua/laws/show/995.021>> (2020, March, 22).

³ Байбороша, Н.С. (2008). Право одиноких мужчин и женщин на реализацию программы суррогатного материнства. *Актуальні проблеми юридичної науки: збірник тез Міжнародної наукової конференції «Сьомі осінні юридичні читання»: у 4 ч., 19-22.*

⁴ Головащук, А.П. (2017). *Цивільно-правове регулювання відносин, пов'язаних із застосуванням допоміжних репродуктивних технологій*: дисертація кандидата юридичних наук. Київ.

parents, or future parents formally divorce before the birth of a child, or a child is born with disabilities, etc. In order to avoid such situations, the surrogacy contract must be notarized and take into account possible contradictory situations as much as possible; to regulate in detail the rights and obligations of the parties during the bearing the child (contacts with the surrogate mother, supporting her, day regimen, diet and healthy eating, presence during medical examinations, etc.), birth of the child (presence during the process of the birth of the child, the moment of transfer of the child); to establish a prescription of a unilateral refusal of the contract; anticipate the consequences of force majeure (divorce, birth of a child with a disability, birth of a dead child, etc.) and establish the liability of the parties for breach of contract. However, the surrogacy contract is risky because the result may be unpredictable (miscarriage, birth of a child with disability, birth of a dead child, etc.) and is a variety of service contracts¹.

According to I. V. Venediktova, “The current legislation very “cautiously” intrudes on the relations of surrogacy, without too much care for their detailed regulation. On the one hand, it gives subjects a wide range of opportunities in the face of the dispositional nature of private legal foundations and the presence of a developed civil society. On the other hand, the brutal realities of the present day beyond the law on organ transplantation, and human trafficking are forcing the issue of legal regulation of surrogacy to arise again and again.”²

Thus, the main disadvantages of the Ukrainian legislation in the field of surrogacy that require elimination are:

- absence of a separate special legal act that would regulate in detail and characterize the procedure for applying the mentioned procedure;
- unregulated essential conditions of the surrogacy contract between the genetic parents and the surrogate mother.

Our analysis of Ukrainian legislation, which regulates relations in the field of surrogacy and the separation of features of its legal regulation, allows us to attribute Ukrainian legislation to the permitting regime and to conclude that it is advisable to reorient it to an altruistic regime. Such reorientation will help minimize the cases of turning both surrogate mothers and children into the items of goods. Unfortunately, today, there are many cases where intermediary agencies and clinics receive financial benefits from surrogacy contracts, and the surrogate mother receives only a small part of these funds.³

Regarding the legislation, it should be noted that in spite of the recent attempt of the Verkhovna Rada of Ukraine to adopt a new law which touched on the relations in the field of surrogacy, there is still a problem of non-regulation of this issue in Ukraine and some provisions of this law are extremely contradictory and unsystematic concerning current regulations. Therefore, it is necessary to pay more attention to this problem and continue to try to improve the legislation, in accordance with the opinions of scientists and foreign experience.

O. V. Onyshchenko and P. Yu. Kozyna propose to define the following in the legislation of Ukraine: specific requirements for a couple who wishes to have a child (medical requirements, legal capacity, age); a clear list of the mandatory terms of the surrogacy contract, including subject matter, timeframe, price, liability, and force majeure (need for termination of pregnancy by medical parameters, birth of more than one child, birth of a child with defects, etc.); establish a prohibition on the recognition of the foreigners, whose country of origin considers such a procedure illegal, as the parents of a child born as a result of the use of surrogacy; to prohibit the opportunity to appeal against the paternity or maternity of a child born by the use of the method of surrogacy, except in cases where it is possible to prove the genetic affinity of the surrogate mother with it⁴.

Further improvement should be done in the following directions:

- to establish clear control over reproductive medicine to prevent legal offenses in this sphere of activity;

¹ Федорченко, Н. (2016). Особливості укладення договору про сурогатне материнство. *Підприємництво, господарство і право*, 12, 65-68.

² Венедіктова, І.В. (2010). Правове регулювання послуг з сурогатного материнства за чинним законодавством України. *Medix. Anti-Aging. Антиэйджинг. Антистаріння: журнал укр. лікарської еліти*, 3 (15), 62-63.

³ Репродуктивна медицина: методичні та правові аспекти. Огляд відкритого семінару (2010). *Газета «Новини медицини та фармації»*, 4(309).

⁴ Онищенко, О.В., Козина, П.Ю. (2015). Сурогатне материнство в Україні та закордоном: порівняльно-правовий аспект. *Юридичний вісник*, 3 (36), 102-108.

- making adoptions to the Family Code of Ukraine to regulate the issue of surrogacy, which will guarantee the protection of the rights of the surrogate mother, genetic parents and child;
- development and implementation of state targeted programs on reproductive technology;
- the involvement of a qualified psychologist who can provide support to surrogate mothers, and monitor the reflection of emotions from such motherhood.

In addition, it is important to create a codified law on surrogacy that would contain all the necessary rules for legal support of the regulation of surrogacy in Ukraine.

Conclusions. Thus, the general legal principles of surrogacy are voluntariness, confidentiality and contractual regulation, and the variant basis is remuneration (gratuity). In Ukraine, in addition to the above principles, surrogacy is only performed if there are medical indications for the application of the procedure and the possibility of use in the interests of men and women who are officially married. We consider it expedient to adopt the Law of Ukraine “On surrogacy” and further improvement of the legislation governing relations in the field of surrogacy.

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